STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 9, 2006
v J & J SLEEP, INC., Defendant-Appellant.	No. 259189 Ingham Circuit Court LC No. 03-000609-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JACK A. KINGEN, Defendant-Appellant.	No. 259190 Ingham Circuit Court LC No. 03-000610-FH

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In Docket No. 259189 defendant J & J Sleep, Inc., (J & J) appeals as of right from its jury-trial convictions of 16 counts of Medicaid fraud (false claim), MCL 400.607(1), and 14 counts of healthcare fraud (false claim), MCL 752.1003(1). In Docket No. 259190 defendant Jack Kingen appeals as of right from his jury-trial convictions of 16 counts of Medicaid fraud (false claim), MCL 400.607(1), and 14 counts of healthcare fraud (false claim), MCL 752.1003(1). Defendants were tried simultaneously with defendant Kingen sentenced to 60 months probation, concurrent on all counts, and both defendants were ordered to pay restitution.

J & J is a sleep clinic that conducts sleep studies on its patients. Generally, the sleep studies begin on the evening of one day and end the next morning. Defendant Kingen, administrator of the clinic, instructed J & J's medical billers to use a double-line billing method for purposes of billing for its services—the first line was for the night that the patient came in up to midnight and the second line was for midnight until the morning that the patient left. A modifier was used on the first line of the billing to indicate that the study was not completed before midnight. However, the Current Procedure Terminology (CPT) manual, which provides

the codes for billing sleep studies, states that a sleep study must be continuous and it must last for at least six hours. At trial, the prosecutor presented evidence of 31 instances of this double-line billing by J & J, when only one sleep study was conducted with the effect being that J & J was paid, or at least seeking to be paid, for two sleep studies in each of those circumstances.

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First, defendants argue that there was insufficient evidence to support their convictions because the evidence did not show that they knew the claims that they were submitting to Medicaid and Blue Cross & Blue Shield (BCBS) were false. We review a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id*. at 561.

Section 7 of the Medicaid False Claim Act, MCL 400.607, provides as follows:

> (1) A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, Act 280 of the Public Acts of 1939, as amended, being sections 400.1 to 400.121 of the Michigan Compiled Laws, upon or against the state, knowing the claim to be false.

Therefore, to obtain a conviction for Medicaid fraud, the prosecutor must show the following:

> (1) the existence of a claim, (2) that the accused makes, presents, or causes to be presented to the state or its agent, (3) the claim is made under the Social Welfare Act, 1939 PA 280, MCL 400.1 *et seq.*; MSA 16.401 *et seq*., (4) the claim is false, fictitious, or fraudulent, and (5) the accused knows the claim is false, fictitious, or fraudulent. [*People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997).]

Section 3 of the Health Care False Claim Act, MCL 752.1003, provides as follows:

> (1) A person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payment of health care benefits knowing the claim to be false.

Further, both acts define the terms "knowing" or "knowingly" as follows:

> "Knowing" or "knowingly" means that the person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a [health care or Medicaid] benefit. Knowing or knowingly does not include conduct which is an error or mistake unless the person's conduct indicates a systematic or persistent tendency to cause inaccuracies to be present. [MCL 752.1003(1)(h); MCL 400.602(f).]

The knowledge requirement can be "inferred from one's actions, and . . . includes both actual and constructive knowledge." *People v Perez-DeLeon*, 224 Mich App 43, 48; 568 NW2d 324 (1997) (citation omitted). The State has the burden of proving beyond a reasonable doubt that the defendant possessed the "knowledge of both the falseness of the claim and that the claim [wa]s substantially certain to cause payment of a benefit." *Id*. at 49. Because of the difficulty in proving state of mind, circumstantial evidence is often necessary and wholly satisfactory. *Id*. at 59.

Moreover, "a mere failure to bill in accordance with the Medicaid or the BC/BSM coding guidelines, by itself may constitute a false claim punishable by criminal law." *Orzame*, *supra* at 559. "Indeed, if a defendant contractually agrees to abide by billing procedures and has access to the applicable manuals and documentation controlling those procedures, deviations from the established procedures are presumed to be intentional or provide evidence that the defendants knew the submitted claims were false." *Id*. at 560.

Defendants contend that they cannot be charged with knowledge of the falsity of their claims where the CPT manual is ambiguous as to how sleep studies should be billed, and where they reasonably relied on the guidance of Medicare employees, who themselves were uncertain as to whether defendants' billing method was proper.

There is no dispute that only one sleep study was conducted, which began on one day and ended on the next, and that defendant Kingen instructed his employees to prepare the bills by using a double-line billing method, which resulted in defendants charging for both days. BCBS and Medicaid personnel, as well as Doctors Dimcheff and Walker, testified that the proper billing method for sleep studies is one claim for one study, regardless if the study began on one day and ended on another. The CPT manual describes a sleep study as continuous monitoring for six or more hours. Therefore, there is nothing in the manual that indicates the study should be broken into two parts, as defendants did, for billing purposes. Further, there was testimony that on five different occasions, defendants were informed that there may be a problem with their billing method: (1) during negotiations with Tawas Hospital the method was questioned; (2) during the BCBS exit conference, the auditors informed defendants that the second billing line was being denied; (3) on August 4, 2000 a letter was mailed to defendants, indicating that the second billing line was being denied because there was only one sleep study; (4) Medicaid auditor Warstler testified that she spoke with Miller in December 2001 and advised her that there was a problem with their billings; (5) during negotiations with Dr. Timothy Macon, the billing method was again questioned. Lastly, there is no dispute that even after defendants knew that their double-line billing method was improper, that they ever made an attempt to repay either BCBS or Medicaid. Thus, when viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence for the jury to find that defendants had the requisite knowledge to support their convictions for both Medicaid and healthcare fraud.

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Defendant Kingen further argues that he was denied the right to due process and a fair trial because of alleged prosecutorial misconduct that occurred at his trial. More specifically, he contends, that remarks made by the prosecutor during his opening statement and rebuttal argument improperly shifted the burden of proof to him. However, we conclude that the remarks

do not constitute prosecutorial misconduct rising to the level of denying defendant a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A claim of prosecutorial misconduct is a constitutional issue which is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, this issue was not preserved below and, therefore, is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *Watson*, *supra* at 586. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Further, "the prosecution may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate defendant to prove his innocence." *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140, lv den 429 Mich 860 (1987).

First, as to the prosecutor's remarks during his opening statement, they did not improperly shift the burden of proof to defendant. Rather, after stating what he believed his witnesses would testify to, the prosecutor noted that whether he would call any additional witnesses would depend on what proofs were presented by the defense.

Next, as to the prosecutor's remarks during his rebuttal argument regarding defendant's failure to produce witnesses to support his defense, this Court has noted that a prosecutor may comment on a defendant's failure to produce witnesses that would be helpful to the defense. *People v Hooper*, 50 Mich App 186, 197; 212 NW2d 786 (1973). Further, in *People v Fields*, 450 Mich 94, 115; 538 NW2d 94 (1995), our Supreme Court stated as follows:

> In sum, prosecutorial comment that infringes on a defendant's right not to testify may constitute error. However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.

Therefore, the prosecutor's remarks during rebuttal argument did not improperly shift the burden of proof to defendant because he was merely commenting on defendant's theory that he had no knowledge that the billing method was improper because he was informed otherwise. Furthermore, the trial court further instructed that the attorneys' arguments were not evidence and should not be considered by the jury. We note that with regard to prosecutorial remarks, instructions are presumed to correct most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004). Therefore, defendant is not entitled to a new trial based on the prosecutor's remarks either during his opening statement or his rebuttal argument.

Defendant Kingen next argues that he is entitled to a new trial because the prosecutor failed to give notice that he intended to introduce similar bad acts evidence subject to MRE

404(b) at trial. Further, he contends that even if the prosecutor had filed the proper notice, the testimony about the criminal investigations by the Federal Bureau of Investigation (FBI), the Michigan Attorney General, and the Social Security Administration, as well as J & J's Medicare billings, was impermissible similar bad acts evidence under MRE 404(b). Because defendant failed to preserve this issue, it is reviewed for plain error affecting his substantial rights. *Carines*, *supra* at 764.

Defendant refers this Court to two instances where he believes the prosecutor violated MRE 404(b) by introducing impermissible bad acts evidence into the trial: (1) during the testimony of one of the medical billers, she discussed J & J's Medicare billings; and (2) during the Attorney General Special Agent's testimony, she stated that she was invited to attend a meeting with the FBI regarding J & J. Defendant contends that the testimony regarding J & J's Medicare billings was improper because it implied that defendant committed Medicare fraud. Further, the testimony about the criminal investigation by the FBI was improper because defendant was not charged with any federal crimes. However, we conclude that the testimony defendant refers us to is not improper bad acts evidence under 404(b). There was never any specific mention of any federal crimes committed by defendant or any charges brought against him by the federal government. Therefore, the most that the jury could infer from the testimony was that defendant billed Medicare with the double-line billing method and that there was some type of federal investigation involving J & J. This does not constitute bad acts evidence under MRE 404(b). See *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993) (indicating evidence suggesting another bad act is not subject to MRE 404(b) if it is otherwise admissible without regard to MRE 404). Further, we note that the majority of the information about Medicare was either introduced by defendant on cross-examination to show that J & J's billing method was proper, or it came thereafter, when defendant had already opened the door to such evidence. And as to defendant's notice argument, because the testimony was not MRE 404(b) evidence, the prosecutor was not required to give defendant notice of its introduction. See *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001) (noting that if the evidence in that case was prior bad acts evidence, then the prosecutor was required to give defendant notice of its introduction before trial).

Defendant Kingen also argues that his trial counsel was ineffective in the following ways: (1) by defense counsel's failure to object to the admission of similar bad acts evidence, which was submitted without the requisite notice under MRE 404(b); (2) by defense counsel's failure to request a limiting instruction after admission of the MRE 404(b) evidence; (3) by defense counsel's failure to object to the prosecutor's improper and burden-shifting remarks during opening and closing arguments; and (4) by defense counsel's failure to zealously defend his client, which is evidenced by his failure to make one objection during the trial, his failure to present a defense other than defendant's testimony, and his failure to call an expert witness to counter the prosecution's experts. We again disagree. Because defendant failed to preserve this issue by moving for a new trial or seeking an evidentiary hearing, our review is limited to the existing record. *Thomas*, *supra* at 456.

To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test,

defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id*. at 6. "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

As discussed above, the evidence that defendant alleges was improper under MRE 404(b) was not similar bad acts evidence. Therefore, any objection by counsel to the admission of the evidence would have been futile, and counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004) (observing that counsel was not ineffective for failing to make a futile or meritless objection). Likewise, because the prosecutor's remarks during his opening statement and rebuttal argument did not improperly shift the burden of proof onto defendant, trial counsel's failure to object to those remarks cannot support an ineffective assistance of counsel claim. *Hoag*, *supra* at 5-6.

Defendant also claims ineffective assistance of counsel based on trial counsel's failure to zealously defend him. Defendant argues defense counsel's lack of zealousness is evidenced by his failure to make one objection during the trial, his failure to present a defense other than defendant's testimony, and his failure to call an expert witness to counter the prosecution's experts. However, these are all matters of trial strategy that this Court does not second-guess. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308, lv den 471 Mich 939 (2004) (noting that decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy that this Court will not second-guess); see also *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998) (stating that trial counsel's failure to call a supporting witness does not inherently amount to ineffective assistance and that there is no "unconditional obligation to call or interview every possible witness suggested by defendant"). Therefore, we conclude that defendant was not denied his right to the effective assistance of counsel.

Finally, we reject defendant Kingen's argument that the cumulative errors in this case deprived him of a fair trial. Because we have concluded that he established no individual error in his trial, his cumulative-error argument must be rejected. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder